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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ALLAN RISTAU, Defendant and Appellant.	H025445 (Santa Clara County Super. Ct. No. 210662)

After being indicted for various securities and tax violations, defendant Steven Allan Ristau was found guilty by a jury and sentenced to state prison. On appeal he contends, among other things, that the trial court committed instructional error by failing to tell the jury that scienter is an element of the offense of selling unregistered securities, by refusing to instruct on mistake of fact as a defense to securities fraud and tax evasion, and by imposing an aggravated term on the basis of facts not found by the jury. We find error in the latter respect only, and remand for limited purposes affecting only sentencing. In all other respects we find the judgment free of reversible error, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that defendant founded PacketSwitch.com (PacketSwitch), a California corporation, in or around February 1999. At that time defendant was the chief executive officer, chief financial officer, and sole director of PacketSwitch. For most of

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, III, IV and V.

its corporate life, PacketSwitch operated without a board of directors; defendant alone ran the company and, for most of this time, had sole authority over its bank accounts. Investors supplied the company's only revenue.

PacketSwitch stock was not sold publicly and was not registered with federal or state securities regulators. Shares were sold privately to some 700 to 900 purchasers. Each purchaser signed a form attesting that he or she was an "accredited investor." Had these recitals been accurate, they would have helped to establish an exemption from registration requirements. However, the five purchasers named as victims in counts 2 through 6 of the indictment testified that they did not in fact meet the statutory criteria for "accredited investor" status and did not know when they signed the forms what that term signified. The forms contained no definition of "accredited investor" and few purchasers asked what it meant. Defendant testified that he accurately defined the term for those who asked.

Defendant told investors that PacketSwitch was going to render the internet obsolete by establishing a global multimedia network using new technology including wireless transmission, fiber optics, a "brand new operating system based on pictures not zeroes and ones," a new central processing system, a new database technology, a new optical switch, and new encryption technology. Defendant described this technology to investors as already being in existence. In fact it did not exist. In one videotaped demonstration, defendant showed investors a "set top player" in San Jose that he said reflected "technology that we developed a long time ago." He displayed movies which he said were being transmitted by "completely wireless" means from a Qwest location in Sunnyvale, 12 miles away. In fact the signal was carried by wire from Sunnyvale to a San Jose building, from which it was transmitted by a commercially available wireless device to the rooftop of the building where the demonstration took place, then by wire to a commercially available wireless "access point" in the ceiling of the room where the

demonstration took place, which transmitted the signal wirelessly to the set-top device about eight feet away.

Defendant said that the new technology would first be introduced in countries with little or no data infrastructure, on the theory that it would be less expensive to build there. He told investors that he had connections in various countries including South Korea, Vietnam, Nigeria, and the Philippines. He also stated that he had a "strategic alliance" with Global Crossing, an established company, when in fact he had no firm relationship with that entity. He admitted that some of his statements were misleading, but denied that he intended to defraud anyone by them.

Defendant also failed to inform investors of various facts that the jury could find to have been material to an evaluation of PacketSwitch's prospects. He did not tell them that, as of the date of the videotaped demonstration, the federal Securities and Exchange Commission (SEC) was investigating PacketSwitch for possible securities violations. Nor did he tell them that the stock they were buying had not been registered with or approved by state or federal securities regulators. He did not disclose that some of the patent applications he had filed were clouded by ownership being asserted claims by his previous company, Internet Telephone Company. Nor did he tell investors that his three previous companies had all gone out of business, that he had filed for personal bankruptcy in the early 1980's, or that he was asked to resign as chief executive of Internet Telephone Company due to alleged mismanagement and financial improprieties. He testified that the latter allegations were false, and were the product of a "business war" between himself and a major investor in that company.

The prosecution introduced evidence of questionable financial transactions by which defendant secured various payments to himself, usually in the name of his wife, and used corporate funds to pay personal expenses, including a luxurious family vacation.

Defendant testified that he had believed the stock was sold in a manner complying in all essential respects with applicable law. However he admitted being told by an

attorney that he was operating in violation of federal securities regulations. He testified that the attorney did not specify the rules he was breaking, and that he did not investigate further because he thought the attorney was just upset over having been fired.

Defendant's 1998 tax return failed to report all income he had earned that year. A prosecution witness testified that whereas defendant reported $5,147 in taxable income, the correct figure was $157,426, leaving an unpaid tax liability of $10,036. The PacketSwitch corporate return for 1999, which defendant signed, failed to report compensation paid to him. He admitted not filing a personal return for 1999. He attributed these events to the theft of certain records and to his reliance on accountants.

The SEC commenced an investigation of PacketSwitch in June 2000. Three months later PacketSwitch essentially ceased operations. Shortly thereafter defendant agreed to stop selling PacketSwitch stock. PacketSwitch eventually declared bankruptcy.

Defendant was indicted for one count of fraud in the offer or sale of securities (see Corp. Code, § 25541, subd. (a)), five counts of offering or selling unregistered securities (see Corp. Code, §§ 25110, 25540, subd. (a)), two counts of filing false tax returns (see Rev. & Tax Code, § 19705, subd. (a)(1)), and one count of failing to file a tax return, with intent to evade taxes (see Rev. & Tax Code, § 19706). The jury found him guilty on all charges and also found, in connection with the first count, that he intentionally took property with a value in excess of $2,500,000. (See Pen. Code, § 12022.6, subd. (a)(4).) The trial court imposed a sentence of 11 years in prison, consisting of the upper term of five years on count 1 (fraud), a four-year enhancement under Penal Code section 12022.6, subdivision (a)(4), and consecutive eight-month sentences on each of the three tax counts. Five three-year sentences were imposed for sales of unqualified securities (counts 2-6), but stayed pursuant to Penal Code section 654. The court also imposed fines and restitution orders totaling over $5 million.

Defendant filed this timely appeal.

DISCUSSION

I. *Recusal*

Defendant contends that the trial court erred by denying a defense motion to recuse the entire bench of the Santa Clara County Superior Court. The motion, brought on the date the matter was to be called for trial, asserted that a reasonable appearance of judicial bias against defense counsel appeared from the fact that defendant's attorney represented another person, one Betsey Lebos, on whose behalf counsel had filed a federal civil action against all of the judges of the court.

The People contend that defendant procedurally forfeited any right to recusal as well as any right to appellate review of this issue, and that the recusal motion was in any event meritless. Defendant has not replied to these points, which appear well taken. At the hearing on the motion to recuse, counsel conceded that he had represented Ms. Lebos for about five months. He did not dispute the prosecutor's statement that the "dual representation" underlying the motion already existed, and must have been known to counsel, when counsel substituted into this case as defendant's attorney, five or six weeks before the motion was brought. Indeed, far from contesting this assertion, counsel argued that he had no duty to disclose his representation of Ms. Lebos at that time, and that instead "there is a duty on the part of . . . the District Attorney's office, and the Courts to check" for the existence of "conflicts." He argued that he had no reason to seek to disqualify the court earlier because, until the case was assigned for trial, "[i]t could have been [assigned to] an out-of-county judge," in which case he would "have no objection."

An attempt to disqualify a judge must be made "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc., § 170.3, subd. (c)(1).) Here defense counsel brazenly admitted that he knew of the grounds for disqualification several weeks before moving for recusal, but felt no obligation to disclose them until the case was assigned for trial. It thus appears that counsel failed to move for recusal "at the earliest practicable opportunity after discovery

of the facts" giving rise to the motion. (Code Civ. Proc., § 170.3, subd. (c)(1).) This is a clear forfeiture of any claim for disqualification. (See *In re Steven O.* (1991) 229 Cal.App.3d 46, 55.) Counsel's suggestion below that the case might have been assigned to a judge from outside the court, obviating the potential objection, is unavailing in the absence of some concrete basis for such an expectation.

We also note that the denial of a statutory disqualification motion, such as the one under scrutiny here, is "not an appealable order" but "may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision . . . ." (Code Civ. Proc., § 170.3, subd. (d).) There is no question that this provision on its face precludes appellate review of the order now challenged. Nor can we accept defendant's contention that the failure to seek such review constituted ineffective assistance of counsel.[1] An obvious tactical reason for that failure may be seen in the complete absence of any discernible merit in the recusal motion. Moreover, since it does not appear that a writ petition would have been likely to succeed, defendant has not established that he suffered any prejudice as a result of the failure to file such a petition.

The denial of the recusal motion is not properly before us, and in any event appears free of error.

II. ***Scienter In Sale of Unqualified Securities***

Defendant contends that the trial court erred by failing to instruct the jury that some degree of scienter had to be found in order to convict him, in counts 2 through 6, of selling unqualified securities in violation of Corporations Code sections 25110 and 25540, subdivision (a).

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[1] This makes it unnecessary to consider whether a finding of ineffective assistance of counsel would have the effect of excusing defendant from the cited time limitation.

The court instructed that the offense consists of the intentional offer or sale of a security at a time when it has not been qualified by the Commissioner of Corporations. The court further told the jury that defendant was not guilty of these charges if the security was exempt from the qualification requirement, which would be the case if it was sold to no more than 35 investors each of whom possessed certain affiliations with defendant. The court added that the 35-investor limit excludes any " 'accredited investor,' " which it defined as a person who, at the time of the sale, had a net worth in excess of $1 million, or who had individual income of $200,000 or joint income of $300,000 in each of the preceding two years, and has a "reasonable expectation" of maintaining that level of income. In other words, the sale was exempt from the registration requirement if all purchasers were either affiliated with defendant or had the requisite levels of net worth or income.

With respect to the mens rea, or culpable mental state, required to convict of such a charge, the court stated that "a general criminal intent need only be shown. Proof that the defendant had an evil motive or an intent to violate the law is not required. Moreover, evidence that the defendant relied on the advice of counsel or that he acted in good faith is not a defense." Shortly thereafter, the court instructed that for purposes of these counts, "the doing of the act is a crime. The intent with which the act is committed is immaterial to guilt."

Defendant asserts that these instructions were deficient for failure to require a finding that defendant *knew* the security was not exempt from registration, or was criminally negligent in failing to acquire such knowledge. Defendant acknowledges that the governing statutes contain no such requirement, but contends that it must be implied under the authority of *People v. Simon* (1995) 9 Cal.4th 493 (*Simon*). In that case the Supreme Court held that "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in [Corporations Code]

section 25401," i.e., making false statements or material omissions in the sale of a security. (*Id.* at p. 522; see *id.* at p. 497 ["the trial court erred prejudicially in instructing that [Corporations Code] sections 25401 and 25540 create an offense that does not require either (1) knowledge of the false or misleading nature of a representation or of the materiality of an omission, or (2) criminal negligence in failing to acquire such knowledge"].)

The question before us is whether the reasoning in *Simon* leads to a similar conclusion for violations of Corporations Code section 25110. One published decision has already held it does not. (*People v. Corey* (1995) 35 Cal.App.4th 717 (*Corey*).)[2] We concur in that conclusion, though not entirely in the reasoning by which it was reached.

We must begin by isolating the rationale in *Simon* in order to determine its applicability here. In reaching its conclusion that the statutes there had to be read to incorporate a scienter requirement, the court alluded to a number of factors.[3] Prominent among these was the fact that under the statute providing *civil* remedies for material falsehoods or omissions in the sale of securities, a defendant could avoid liability for damages by showing that he or she " 'exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission.' [Citation.]" (*Simon, supra,* 9 Cal.4th at p. 509, fn. 12, quoting Corp. Code, § 25501.) The constructional preference against interpretations yielding "unreasonable or arbitrary

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[2] The California Supreme Court has granted review in a recent decision that declined to follow *Corey*. (See *People v. Salas*, review granted Sept. 29, 2004, S126773.)

[3] In addition to the considerations we discuss below, the court suggested that its holding was supported by legislative history and federal authorities. (*Simon*, *supra*, 9 Cal.4th at p. 509.) Later, however, it seemed to find those sources equivocal at best. (*Id.* at pp. 511-513.) The court also alluded to the rule of lenity, under which a criminal statute yielding two otherwise sound interpretations will ordinarily be given the meaning more favorable to the accused. (*Id.* at p. 517.)

results" suggests that for conduct to warrant criminal penalties, it should ordinarily be "more, not less, culpable" than conduct sufficient to trigger civil liability. (*Simon, supra,* 9 Cal.4th at p. 517.) Thus it would be "an unreasonable application of the statutory scheme" for the law to make lack of scienter a defense against *civil* liability while imposing *criminal* punishment without regard to fault. (*Id.* at p. 522.)

The court also found tension between the imposition of punishment without proof of scienter and the harshness of the penalties authorized by the statute. "We generally presume that the Legislature would not attach a substantial penalty to a strict liability offense. 'Harsh penalties' are a ' "significant consideration in determining whether the statute should be construed as dispensing with mens rea." ' [Citations.]" (*Simon, supra,* 9 Cal.4th at pp. 509-510, fn. 13.) The court recognized that this factor could apply to most or all of the criminal penalties imposed by the securities act, but declined to "assume that the Legislature intended that scienter be an element of every regulatory aspect of the Corporate Securities Law of 1968." (*Id.* at p. 509, fn. omitted.) At the same time, it declared this reluctance "tempered somewhat by recognition" that the Legislature had since amended the governing statute to "attach[] extremely heavy penalties to criminal violations of some provisions" of the act. (*Id.* at pp. 509-510, fn. 13.)[4] As affecting the conduct at issue there, the amendments increased the maximum punishment to a prison term of five years and fine of $10 million. (*Id.* at pp. 509-510, fn. 13.) Although these amendments occurred after the defendant engaged in the conduct there at issue (see *id.* at p. 497), they were relevant as "strongly impl[ying] a current legislative

[4] The court urged the Legislature "to clarify which of the criminal violations of the Corporate Securities Law of 1968 that are punishable under either subdivision (a) or (b) of [Corporations Code] section 25540 are strict liability offenses and what mental states are elements of those which require scienter." (*Simon, supra,* 9 Cal.4th at pp. 509-510, fn. 13.) Although the Legislature has since amended the act several times, the court's plea has thus far gone unheeded.

understanding that neither [Corporations Code] section 25401 nor those other regulatory provisions of the Corporate Securities Law of 1968 create a strict liability offense." (*Id.* at pp. 509-510, fn. 13.)

More generally, the court noted that numerous cases expressed reservations about the imposition of criminal punishment without proof of mens rea. The United States Supreme Court had declared the requirement of mens rea to be " 'the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence' " (*Simon, supra,* 9 Cal.4th. at p. 519, quoting *Dennis v. United States* (1951) 341 U.S. 494, 500), and had described punishment without mens rea as having a " 'generally disfavored status' " (*Simon*, *supra*, at p. 520, quoting *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 437-438). The *Simon* court read the high court's decisions as tending to uphold criminal punishment without fault only with respect to "regulatory or 'public welfare' offenses," and "on the assumption that the conduct poses a threat to public health or safety, the penalty for those offenses is usually small, and the conviction does not do 'grave damage to an offender's reputation.' [Citation.]" (*Simon*, *supra*, 9 Cal.4th at p. 519, fn. omitted.)

The court in *Simon* also discerned in its own decisions recognition of "a 'prevailing trend "away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability." [Citation.]' " (*Simon, supra,* 9 Cal.4th at p. 521.) These decisions too assumed the constitutionality of criminal punishment without fault for "regulatory or malum prohibitum[5] crimes" where

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[5] "Malum prohibitum" refers to offenses which are blameworthy only in that they are prohibited, as distinct from "malum in se" offenses, in which the proscribed conduct is considered intrinsically wrongful. (Black's Law Dict. (8th ed. 2004) pp. 978-979.) Examples of the former would include ordinary traffic offenses or violations of purely economic regulations, while examples of the latter would be traditional felonies like robbery or murder. The distinction may not bear a great deal of weight if leaned upon too

"the purpose is to protect public health and safety and the penalties are relatively light." (*Id.* at p. 521.)

The court acknowledged that *United States v. Freed* (1971) 401 U.S. 601, 613, upheld a relatively severe punishment (up to 10 years' imprisonment) without proof of scienter for the possession of unregistered hand grenades. However the court noted the comment in *Freed* that such punishment could have been justified by Congress on the premise that " 'one would hardly be surprised to learn that possession of hand grenades is not an innocent act.' [Citation.]" (*Simon*, *supra*, 9 Cal.4th at pp. 519-520, fn. 17, quoting *United States v. Freed*, *supra*, 401 U.S. at p. 609.) The apparent significance of this observation was that the obviously hazardous nature of the conduct there put the offender on notice of the potential for severe punishment. In contrast, the *Simon* court observed, "public safety is not involved" in securities charges, and the defendant's conduct there did not intrinsically put him on notice that it might be criminally punishable: "[I]t cannot be assumed that an individual would realize that making a statement he believed to be true or failing to reveal information about acts that were not contemplated at the time a security was sold, and thus did not seem material, was criminal."[6] (*Simon*, *supra*, 9 Cal.4th at pp. 519-520, fn. 17.)

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heavily, but serves a useful purpose in some contexts. (See *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 566, fn. 7, quoting 6A Corbin on Contracts (1962) § 1378, pp. 24-25. [As bearing on the doctrine of illegal contracts, "[t]he Latin terms *malum in se* and *malum prohibitum* are attacked by Corbin for concealing the 'falsity' of the purported distinction."]; Black's Law Dict., *supra*, at p. 978 [quoting a treatise for the proposition that the distinction has been criticized since at least the Nineteenth Century].)

[6] This statement is far from self-evident as it applies to *affirmative representations*. Most if not all sellers of securities know that such transactions are heavily regulated. In the interest of ensuring the integrity of the securities markets, the Legislature might well conclude that anyone participating in such a transaction must ensure the accuracy of his her statements either by confirming facts to a degree of certainty that makes the speaker willing to gamble on an unqualified assertion, or by fully

Ultimately the court did not decide in *Simon* whether the federal and state constitutions would *permit* five years' imprisonment or a $10 million fine for false statements or omissions made without scienter. However, it reasoned that "the due process implications of imposing a criminal penalty of that magnitude for such conduct are sufficient to raise a substantial question as to the validity of [Corporations Code] section 25401 if it is construed as creating a strict liability criminal offense." (*Simon, supra,* 9 Cal4th at p. 522.) Because the court "presume[d] the Legislature did not intend to enact a statute of doubtful validity," the statute would be construed to include, as an element of the criminal offense, "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them." (*Ibid*.)

The holding in *Simon* thus appears to rest on a number of somewhat interrelated considerations: (1) The preference for construing statutes to avoid unreasonable results favored implication of a scienter requirement, because it would be unreasonable to impose criminal punishment without regard to the defendant's mental state when the lack of scienter is a defense to civil liability. (2) The harshness of the criminal penalties supports an inference, in and of itself, that the Legislature did not intend to impose

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disclosing the extent of any uncertainty which makes such a gamble unattractive. The Legislature might well conclude that such a person would hardly be surprised to learn that he could be criminally punished for failing to choose either option, and instead unqualifiedly asserting a fact that proves to be materially false. Such a regime does not require infallibility, but it does require caution in asserting without qualification matters not reliably *known* to be true.

A different situation is presented by a rule that punishes the seller of securities for an innocent *failure to disclose* material facts which were not known or reasonably knowable at the time of the transaction. The Supreme Court seemed most concerned with this possibility, i.e., criminal punishment for "failing to reveal information about acts that were not contemplated at the time a security was sold." (*Simon*, *supra*, at pp. 519-520, fn. 17.) However the court made no distinction between omissions and affirmative misstatements, and its holding must be viewed as applying equally to both.

criminal culpability without proof of fault. (3) Requiring mens rea is consistent with the general disfavor in which Anglo-American jurisprudence has traditionally held strict liability offenses. (4) The statute differs from those in which the imposition of criminal punishment without mens rea has been held constitutionally permissible, in that the penalties are harsh and the prohibited conduct does not directly bear on public health or safety. (5) In view of these considerations, a construction dispensing with proof of mens rea would cast a sufficient cloud over the constitutional validity of the statute to trigger the presumption against constitutionally doubtful readings of statutes.

In *Corey*, *supra*, 35 Cal.App.4th 717, the court held that the reasoning in *Simon* did not extend to the offense at issue here, i.e., sale of unqualified securities in violation of Corporations Code section 25110.[7] This holding rested on three subsidiary conclusions. First, the court reasoned that in contrast to the statute in *Simon*, the statute imposing civil liability for sales of unqualified securities "does not contain a scienter element." (*Cory, supra,* 35 Cal.App.4th at pp. 728-729, citing Corp. Code, §§ 25503, 25501.) Second, the court concluded that the maximum criminal penalties to which the defendant there was exposed were "much less" than those at issue in *Simon*, i.e., "up to $1 million in fines and up to one year imprisonment." (*Cory, supra,* 35 Cal.App.4th at p. 729, fn. omitted.) Finally, the court noted that two commentators, who were viewed as

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[7] At least two cases decided before *Simon* had rejected contentions that some form of scienter or specific intent was an element of the offense of selling unqualified securities. In *People v. Clem* (1974) 39 Cal.App.3d 539, the court rejected a contention that the reference to " 'willful' " violations in Corporations Code section 25540, subdivision (a), required some evidence of moral culpability. The willfulness contemplated by the statute, the court wrote, was " 'simply a purpose or willingness to commit the act.' " (*People v. Clem, supra,* 39 Cal.App.3d at p. 542.) "[E]xcept as provided by [Corporations Code] section 25700 [concerning acts done in conformity with regulatory directions,] advice of counsel or other evidence of good faith is not a defense to charge of dealing in unqualified securities." (*Id*. at pp. 542-543, fn. omitted; see *People v. Feno* (1984) 154 Cal.App.3d 719, 725 ["Criminal violations of [Corporations Code] section 25110 are strict liability offenses"].)

chiefly responsible for the original drafting of the act, and who were quoted in *Simon* for their criticism of a case imposing strict liability for violations of Corporations Code section 25401, had offered no similar objection to other decisions treating the violation of Corporations Code section 25110 as " 'a strict liability offense.' " (*Cory, supra,* 35 Cal.App.4th at p. 729, quoting 1 Marsh & Volk, Practice under the Cal. Securities Laws (rev. ed. 1994) § 1413[1], p. 14-80 and fn. 10; see *Simon, supra*, 9 Cal.4th at pp. 513-514).

The first and second points lose some of their force under close examination. It is not entirely accurate to describe the statute in *Simon* as requiring "a scienter element" in the parallel civil cause of action. Instead the statute there allowed an *affirmative defense* to civil liability, i.e., the defendant was liable "unless [he or she] prove[d] that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission. . . ." (Corp. Code, § 25501; see *Simon*, *supra*, 9 Cal.4th at p. 516.) Therefore the *Simon* court did not simply import the elements of the civil cause of action into the criminal offense; it required the prosecutor to affirmatively prove a fact no civil plaintiff was required to prove, i.e., the defendant's "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them." (*Simon*, *supra*, 9 Cal.4th at p. 522.)

Defendant contends that the reasoning in *Corey* was also unsound for failing to consider the effect of *administrative regulations* bearing on Corporations Code section 25510, which he reads as incorporating a scienter defense. In fact the key regulation is ambiguous. It defines "accredited investor" as a buyer who "*comes within one of the categories* of an 'accredited investor' in Rule 501(a) of Regulation D adopted by the Securities and Exchange Commission . . . ." (Cal. Code Regs., tit. 10, § 260.102.13, subd. (g).) The cross-referenced federal regulation in turn sets forth a number of

categories under a paragraph stating that an accredited investor is "any person who comes within any of the following categories, *or who the issuer reasonably believes* comes within any of the following categories, at the time of the sale of the securities to that person." (17 C.F.R. § 230.501(a), italics added.) Defendant's argument assumes that by incorporating the federal *categories*, this regulation also incorporates the introductory reference to reasonable belief. This is not the literal meaning of the regulation, however. The meaning urged by defendant could have been achieved more clearly and succinctly by simply incorporating the *entire federal definition* rather than the "categories" listed there.

In any event the regulatory definition of "accredited investor" has only a debatable bearing on the question before us. The parallel reasoning in *Simon* was apparently that the *Legislature* would not readily be supposed to have provided sellers with a scienter defense against civil claims while subjecting them to criminal punishment regardless of innocent intent. (See *Simon*, *supra*, 9 Cal.4th at pp. 516-518.) We question whether any such inference can be drawn where the putative discrepancy arises not within the legislative scheme but between a statute and an administrative regulation. The divergence in authorship attenuates and weakens, if it does not destroy, any interpretative inference arising from such a discrepancy.

We also note, however, that the *Corey* court was somewhat mistaken in its assessment of the penalties at issue. It distinguished *Simon* on the ground, among others, that the "magnitude of potential criminal penalties for violation of [Corporations Code] section 25110 is much less than violation of [Corporations Code] section 25401; up to $1 million in fines and *up to one year* imprisonment." (*Corey, supra,* 35 Cal.App.4th at p. 729, fn. omitted, italics added.) In fact the maximum prison term for violating

Corporations Code section 25110 is *three* years.[8] Thus, while the penalties are indeed less onerous than the five years and $10 million found so "harsh" in *Simon*, *supra*, 9 Cal.4th at page 509, footnote 13, the difference is not as great as the *Corey* court believed.

Nonetheless we believe the result in *Corey* to be correct. The court's rationales, if somewhat weaker than they appear at first glance, retain significant force. Moreover, we find the reasoning in *Simon* inapposite here for two reasons not recognized in *Corey*: the conduct here is more intrinsically culpable than that in *Simon*, and a scienter defense would impair the legislative purposes served by criminalizing that conduct more than was the case in *Simon*.

The conduct at issue in *Simon*, and penalized by Corporations Code sections 25401 and 25540, subdivision (b), consists of *uttering words* that prove to be untrue or materially incomplete. Part of the court's reluctance to penalize such conduct without proof of fault was that one who utters words while reasonably believing them to be true may have no reason to suspect that his or her conduct may lead to penal sanctions. As noted above, the court distinguished *United States v. Freed*, *supra*, 401 U.S. 601, on the ground that the rationale there imputed to Congress—"one would hardly be surprised to learn that possession of hand grenades is not an innocent act" (*id.* at p. 609, fn. omitted)—did not apply to the innocent utterance of false or materially incomplete

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[8] The penalties for a violation of Corporations Code section 25110 are prescribed by Corporations Code section 25540, subdivision (a), which provides, as pertinent here, that violators "shall upon conviction be fined not more than one million dollars ($1,000,000), *or imprisoned in the state prison*, or in a county jail for not more than one year, or be punished by both that fine and imprisonment." (Italics added.) The italicized language invokes the provisions of Penal Code section 18, which as pertinent here provides that "every offense declared to . . . be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years." The maximum penalties thus imposed for a violation of Corporations Code section 25110 are three years in state prison and a $1 million dollar fine.

statements. As the court in *Simon* observed, "it cannot be assumed that an individual would realize that making a statement he believed to be true or failing to reveal information about acts that were not contemplated at the time a security was sold, and thus did not seem material, was criminal." (*Simon*, *supra*, 9 Cal.4th at pp. 519-520, fn. 17.)

Here, in contrast, the conduct penalized by Corporations Code sections 25110 and 25540, subdivision (a), could readily have been viewed by the Legislature as resembling the conduct in *Freed* in that it carried an obvious and intrinsic risk of serious legal consequences. These statutes do not attach criminal penalties to the commonplace conduct of speaking or failing to speak, but to the far more formal and specific conduct of engaging in a securities transaction. Such conduct cannot be undertaken inadvertently, casually, or incidentally. An investor who wants to avoid the penalties imposed by these statutes can do so by registering the securities prior to the transaction, or by making certain that the transaction is in fact exempt. (See Corp. Code, §§ 25111-25113; Cal. Code Regs., tit. 10, § 260.110 et seq.) The Legislature could wish to create such a regime in order to deny any other safe harbor and thereby to deter sellers from relying on exemptions in any but the clearest cases. In other words, the Legislature could intend to compel the seller, under pain of criminal sanction, to *guarantee* that any sale of unregistered securities is *in fact* exempt. A defendant's claimed *belief* that the transaction was exempt, when in fact it was not, could well be viewed as no more availing than an amateur grenadier's claim that he thought his conduct conformed to law. That is, the Legislature could rationally believe that one who sells unregistered securities should "hardly be surprised to learn that [his conduct] is not an innocent act." (*United States v. Freed, supra,* 401 U.S. at p. 609, fn. omitted.)

Such a supposition gains weight when evaluated in light of the centrality of the registration requirement to the securities laws, which serve the crucial social objective of ensuring the integrity of securities markets and facilitating the flow of investment capital,

to the ultimate benefit of all citizens. To permit a scienter defense to the sale of unqualified securities would significantly impair the efficacy of the registration requirement by permitting an unscrupulous seller to raise a colorable defense in every case merely by asserting that he *thought* his victims were accredited investors. The groundwork for such a defense could be laid during the sale itself by requiring each purchaser to execute a boilerplate form containing a recital that he or she is an accredited investor. Indeed this is exactly what defendant did here, and it forms essentially the entire basis of his claim that the jury might have entertained a reasonable doubt about the existence of a culpable mental state. To allow such a defense would substantially alter the risks confronting a seller when he or she is put to the choice between registering the security and gambling on an exemption. The hazards of the latter choice would be significantly reduced, and the integrity of the markets would to that extent be impaired, by such an escape clause.

The Legislature could also rationally conclude that criminal sanctions require this kind of "teeth" because civil and administrative remedies will not suffice to deter the kind of misconduct targeted by these statutes. Offending sales will ordinarily involve securities not in a going concern but in a new venture. Such an investment is riskier both in a business sense and in terms of the reduced likelihood of obtaining redress if securities violations are discovered after the venture fails. The issuer of such securities may hope to make himself effectively immune from adverse civil consequences by dissipating or secreting the proceeds of his misconduct. Without the threat of criminal penalties, such a person may feel beyond any coercive power of law.

The Legislature could thus conclude that one who sells unqualified securities must either establish that the transaction was exempt *in fact* or suffer the penal consequences. The offense is not "strict liability" in the purest sense; it requires a general intent to do

the proscribed act, i.e., to sell the securities.[9] But the Legislature could well intend, and we believe did intend, that no more than this is necessary for the imposition of criminal punishment if the seller of new securities fails to bring himself within the *objective* safe harbors of registration or exemption. Like the possessor of grenades, and unlike the utterer of words, one who sells securities that are not registered can reasonably be deemed on notice that his conduct may carry serious penal consequences. His conduct is inherently hazardous to the public good, and he must exercise the utmost punctiliousness to conform it to law, or suffer criminal punishment.

This case amply illustrates the necessity for such a rule. Defendant's claim that he lacked scienter depends on the fact that purchasers of PacketSwitch stock signed "investor registration forms" containing the recital that the signer was an "accredited investor." If true this would tend to support a conclusion that the sale was exempt from the registration requirement. (See Corp. Code, § 25102, subd. (f); Cal. Code Regs., tit. 10, § 260.102.13, subd. (g).) To qualify as an "accredited investor," however, the signer had to possess a prescribed net worth or annual income. Nothing in the forms, or otherwise in evidence, justified a belief by defendant that the purchasers actually met these qualifications. The forms did not specify the criteria establishing the status of "accredited investor" and did not indicate the significance of such status. In fact none of the purchaser-victims identified in the criminal counts here at issue did meet those qualifications; each testified that he or she did not understand what the reference to

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[9] The trial court thus directed the jury confusingly, if not erroneously, when it instructed that "the doing of the act is a crime. The intent with which the act is committed is immaterial to guilt." This is true in the narrow sense that an *innocent purpose* is immaterial. However, the crime does require an intent to sell the security in question. Indeed the court elsewhere instructed the jury correctly that "a general criminal intent need only be shown." Any resulting confusion was harmless by any standard, since there was no basis whatever for the jury to entertain a reasonable doubt as to defendant's intent to sell the securities in question.

"accredited investor" meant and did not in fact meet the statutory criteria. Had buyers been asked to certify that they possessed the *specific characteristics* establishing an accredited status, i.e., a net worth of $1 million or annual income of $200,000 ($300,000 for a married couple), many of them would undoubtedly have balked. Instead they were asked to sign forms containing language the meaning of which was neither known nor communicated to them. It is impossible to see how their signatures on these forms could have supported a good faith belief by defendant that they in fact met the requisite criteria.[10]

We also note that the Legislature has often provided *explicit* mens rea requirements where it wishes to condition liability in that manner. (See, e.g., Corp. Code, §§ 25400, subd. (a) [unlawful to engage in certain conduct "[f]or the purpose of creating a false or misleading appearance of active trading in any security or a false or misleading appearance with respect to the market for any security"], & (b) [same, "for the purpose of inducing the purchase or sale of such security by others"], 25402 [insider trading while possessing information which actor "knows is not intended to be" available to public, "unless he has reason to believe that the person selling to or buying from him is also in possession of the information"], 25403, subd. (a) [liability for "with knowledge directly or indirectly control[ling] and induc[ing] any person to violate any provision of this division"], & (b) [same, "knowingly provid[ing] substantial assistance to another person

[10] An offering memorandum prepared by an independent firm in connection with defendant's prior venture, Internet Telephone Company, included a definition of "accredited investor." Defendant's executive assistant testified that she did not know why the PacketSwitch forms lacked a similar statement of the relevant criteria; she "just assumed that [defendant] told them." Defendant acknowledged, however, that he did not "explain orally or [in] any other way to investors what the definition of an accredited investor was." He explained the difference between the two forms by describing the investor's form here as "a business plan" rather than a private placement, asserting, "There's a big difference between the two."

in violation of any provision of this division . . ."], 25404 [unlawful to "knowingly alter . . . any record . . . with the intent to impede, obstruct, or influence the administration or enforcement of this division"], 25504.1 [joint and several liability for persons assisting in certain conduct "with intent to deceive or defraud"].) The Legislature obviously knows how to incorporate a culpable mental state into the definition of a violation of the securities laws when it chooses to do so.

We conclude that there was no error in failing to instruct the jury that defendant was only guilty of selling unqualfied securities if he knew the purchasers were not accredited investors or acted with criminal negligence in failing to ascertain that fact.

III. *Mistake of Fact*

A. Fraud Counts

Defendant contends that the trial court erred by refusing to instruct the jury on mistake of fact, which defendant contends was relevant to the charges of fraud (count 1) and tax evasion (counts 7, 8, and 9). Basically he argues that all of these offenses required specific intent; that specific intent may be negated by mistake of fact; that there was evidence here on which to predicate a finding of such negation; and that the jury should therefore have been instructed on the relevant legal principles. The People contend that the jury was adequately instructed on the issues defendant sought to highlight and necessarily resolved them adversely to defendant. We have concluded that while the court may have erred by refusing to give such an instruction, the error was harmless by any standard.

With respect to count 1, the jury was instructed that in order to establish a violation of Corporations Code section 25541, the prosecution had to prove "[t]hat the defendant acted willfully, knowingly and with the intent to defraud." The court defined the last three adverbs as follows: " 'Knowingly' means to act voluntarily and deliberately, rather than mistakenly or inadvertently. [¶] . . . '[W]illfully' means to act knowingly and purposely, with an intent to do something the law forbids, that is to say,

with bad purpose either to disobey or disregard the law. [¶] 'Intent to defraud' . . . means to act knowingly and with the intent to deceive."

Defendant contends that the court should also have read CALJIC No. 4.35, which provides, "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." Defendant contends that the absence of this instruction prevented him from having the jury's attention "specifically focused on the most essential aspect of his defense: that he had no intent to deceive, [and] that any misrepresentations were the product of mistake . . . ." Defendant notes that counsel requested such an instruction and the People do not suggest that the request was inadequate.

We agree that it would have been better practice for the trial court to give the instruction once the defense requested it. The court appeared inclined to do so, but was apparently dissuaded by the prosecutor. As a general matter, instructions requested by a defendant should be given if there is any evidence that may plausibly be construed to support them. Here, as defendant notes, he testified concerning various misunderstandings under which he claimed to be laboring, and which might have been taken by a reasonable juror to constitute "mistakes of fact."

However, we need not decide whether the court's refusal to give such an instruction was erroneous, because it is inconceivable that it affected the outcome. The jury was instructed unequivocally that before it could convict defendant of fraud, it had to find that defendant acted with three distinct culpable mental states: (1) "knowingly," i.e., "voluntarily and deliberately, *rather than mistakenly* or inadvertently"; (2) "willfully," i.e., "purposely, with an *intent to do something the law forbids*, . . . with *bad purpose either to disobey or disregard the law*"; and (3) with "intent to defraud," i.e., "the *intent to deceive*." (Italics added.)

While the legal concept of "mistake of fact" might have added another issue to the case on a purely theoretical level, it is impossible to discern how it could have altered the jury's ultimate assessment of the evidence, amplified the significance of any issue, or otherwise conferred any practical benefit on the defense. Obviously if the jury thought defendant might have been innocently mistaken about facts he reported to investors, it could not have found, beyond a reasonable doubt, that he entertained *any* of the three requisite mental states. His conduct would not have been "knowing[]," but "mistaken[]" and "inadvertent[]." If he believed his statements to be true and accurate, he could not be found to be acting with "intent to do [what] the law forbids." And if he thought he was telling the truth, he obviously was not acting with "intent to deceive."

The central perplexity of defendant's "mistake of fact" argument is that it supposes jurors do not know, unless they are told, that intent to deceive is negated by belief in the truth of one's statements. But such an understanding is inherent in the common meaning of the word "deceive," i.e., "to *cause* to *accept as true or valid* what is *false or invalid*." (Merriam-Webster's Collegiate Dict. (10th ed. 2001), p. 297; italics added.) "[I]ntent" in this context means "the act or fact of intending," and "intend" means "to have in mind as a purpose or goal," or at least, "to direct the mind on." (*Id.* at p. 607.) In ordinary usage, then, "intent to deceive" means acting with the purpose of, or directing one's mind to, causing another to accept as true that which is false. Obviously it is impossible to possess this mental state if one does not know the meaning intended to be conveyed is false. It is thus inherent in the common meanings of these terms that one who believes he is communicating the truth does not intend to deceive.

Nor does defendant's discussion of the evidence afford any basis to fear that the jury overlooked these matters. He cites supposed examples of evidence from which the jury might have inferred an exculpatory mistake of fact, but fails to suggest how the jury might have been any more likely to draw such an inference under that rubric than under the instructions it actually received. First he asserts that the requisite mens rea might

have been negated with respect to his assertions that he had a "strategic alliance" with Global Crossing, given that he was operating under his own "definition of 'strategic alliance.' " He asserts that according to his testimony, he had various discussions with Global Crossing; the latter had "agreed to provide [PacketSwitch] with 'the dark fiber' "; "[h]e believed he knew what a strategic alliance was"; and "he believed that his statements regarding having a strategic alliance with Global Crossing were true." "From this testimony," he concludes, "a jury could reasonably conclude that [defendant] had had sufficient contacts with Global Crossing, and had exchanged sufficient mutual promises with Global Crossing, to create the belief, albeit mistaken, that Packeswitch had entered into a 'strategic alliance' with Global Crossing."

Accepting this highly debatable assertion as true, the jury unmistakably rejected this view of the evidence in its verdict, and particularly in the finding that defendant acted with *intent to deceive*. The only way in which defendant's characterization can be reconciled with such a finding is to suppose that he harbored a *private* definition of "strategic alliance," which he believed applied to his relationship with Global Crossing, but that when he told investors he had such an alliance, he knew his words to be conveying a false meaning *to them*. He could then be acting under a mistake of fact (i.e., he mistakenly believed the phrase "strategic alliance" could be applied to the relationship with Global Crossing), but it would not be exculpatory because it would lack any tendency to negate the required mens rea, i.e., intent to deceive. One might theoretically hold a private definition of words which one mistakenly believed could apply to the true facts, and yet commit fraud by using those words with the knowledge that they convey a false state of facts to the hearer. Here the jury necessarily found that defendant intentionally conveyed a false meaning to investors when he claimed to have a "strategic alliance." Given that finding, his claimed "mistake of fact" could not negate the intent to deceive, the purposeful violation of law, or the requirement that he act voluntarily and deliberately, rather than mistakenly or inadvertently. Such a "mistake" would be a pure

construct, an internal psychological fiction, having no bearing at all on the mens rea required to show fraud.

Defendant cites testimony that he says provided substantial evidence of a good-faith belief that PacketSwitch had in fact, as he told investors, acquired certain companies. This evidence, he asserts, supported a finding that "if his statements were false, it was because he was mistaken, not because he intended to deceive." But the verdict precludes such a finding, because rational jurors could not find that he acted with the requisite "intent to deceive" if he believed PacketSwitch had in fact acquired the companies.

Likewise defendant contends that the jury could have found he was "mistaken and not lying" when he told investors PacketSwitch had "just signed a contract with a high-level individual for Vietnam." There was evidence, defendant says, that PacketSwitch had signed a contract with one Kenny Trinh, whom defendant could believe was a "high-level individual," even though he knew Trinh "was not a high-level Vietnam government official." Again, however, if the jury thought defendant believed his words to be truthful, it could not and would not have found that he acted with "intent to deceive." Again, the possibility that defendant harbored undisclosed reservations or qualifications had no tendency to exculpate him but was itself evidence of culpable intent, i.e., that he deliberately conveyed an impression he knew to be false for the purpose of inducing investors to buy the stock. His private belief that his words were true in some narrow literal sense would not constitute a defense under any theory if he in fact knew that his words would cause investors to believe something that was not true. The jury's verdict necessarily reflected a finding that he possessed such knowledge. No instruction on mistake of fact, properly understood, could have helped him.

Likewise we discern no practical sense in which a mistake of fact instruction would have told the jury anything helpful to defendant concerning his statement that "the Government of the Philippines came in as well." He cites testimony which he says

provided "substantial evidence that [defendant] had a legitimate belief that PacketSwitch had met with Phillippine government people and that some of them had come to the PacketSwitch office. To the extent this was not the case, there was ample evidence to support a jury finding that his statement was based on ignorance or mistake of fact." Again, however, the jury could not have rationally found the requisite "intent to deceive" if it thought it reasonably possible that defendant believed his statements to be accurate. Indeed it seems obvious on the face of the evidence cited by defendant that they were *not* accurate; at most they showed that discussions had taken place with persons claiming to have some influence with the government in question. In any event, to convict defendant, the jury had to find not only that the statements were inaccurate but that he uttered them with intent to convey a false meaning. The jury could not rationally make such a finding unless it found that defendant knew his statements to be materially inaccurate. An instruction on mistake of fact would have added nothing to the jury's understanding of this charge.

Finally defendant claims that the jury could find he was acting under a mistake, and thus did not commit fraud, when he told investors the "set-top player" was receiving a signal from 12 miles away by "completely wireless" means. He contends that "there was evidence that the statement was a mistaken characterization based on [defendant's] belief that the same technology which in fact allowed the signal to move wirelessly from elsewhere in the PacketSwitch building [i.e., in the ceiling of the same room] . . . would have allowed it to be transmitted wirelessly from Qwest to PacketSwitch." This is somewhat akin to saying that a self-proclaimed spiritual medium who creates "manifestations" through trickery does not commit fraud if he or she honestly believes that similar manifestations *could have* been caused by paranormal forces. We seriously question the soundness of such a hypothesis, but need not consider that question here. Defendant was entirely free to attempt to raise a reasonable doubt about whether he acted with the requisite intent to deceive. The jury's failure to form such a doubt can by no

reasonable stretch of the judicial imagination be attributed to the absence of an instruction on mistake of fact.

B. Tax Counts

Defendant contends that a mistake of fact instruction would also have been germane to the tax evasion charges because there was evidence that the charged misconduct was the result of mistake. Again, however, the central premise on which this argument is based was conveyed to the jurors by other instructions, and was necessarily rejected by them.

The jury was instructed that in order to find defendant guilty of willfully filing a false tax return, it had to find among other things that he "did not believe the tax return to be true and correct as to every material matter" and that he "made the false or inaccurate statements in a voluntary, intentional violation of a known legal duty." In order to convict of willful failure to file a return, the jury was told, it had to find that the "failure to file the tax return within the required time was done with the specific intent to evade a tax," and that the defendant "acted voluntarily and in an intentional violation of a known legal duty."

Defendant contends that an instruction on mistake of fact was necessary in light of evidence that the conduct charged in the tax counts was, as he contends, "the result of mistake on [his] part." With respect to the underreporting of income on his 1998 individual return, he cites his own testimony that he could not accurately report the income "because all my documents [were] stolen." The $5,147 he reported (as against the $157,426 calculated by a prosecution witness) thus represented his "best guess considering I did not have the records." He testified that he had accepted advice from friends and associates that "you have to file and do the best you can." He said he was assisted by one or more accountants and tax preparers who, he said, "recognized I gave my best estimate—I had to file something—and that when the records were released to me I could file an amendment at that time . . . ." He said that the business expense

figures on the return were based on answers he gave to the accountant, that they reflected his best recollection at the time, and that they also reflected the choice of the lower, more "conservative" choice between a "low figure and a high figure" that "came from a question/answer session" with the accountant.

A second charge of filing a false return was based on the omission from PacketSwitch's 1999 corporate return of any compensation paid to officers, most notably, the compensation paid to defendant that year. He cites his testimony that he signed the return without noting this omission, or its contents in general, because he "believed it was correct based on the trust of the people that . . . worked for [him]." He also testified that "by mistake . . . [he had] turned these matters over to [accountants] to handle," and that they were then handled improperly "because I didn't have time to pay attention to these details which is now . . . bringing me to this court . . . ."

As for the charge of willful failure to file his 1999 tax return, defendant contends that a foundation was laid for a mistake-of-fact instruction by his testimony that he was "too emotionally scarred" by a "war" with his former business partners to file on time; that he and wife got filing extensions; that he left it up to his accountants; and that they advised him "that we could file an amendment later." He asserts that this testimony would have supported a jury finding that he "mistakenly believed he could properly file the 1999 return at a later date when he had complete records," and that "his failure to file was, therefore, a product of mistake, not willfulness."

We first note that the last-mentioned argument concerning the failure-to-file charge is unsound on its face for two distinct reasons: First, the cited testimony simply does not supply any basis for an inference that defendant believed he could *file a return* later; it suggests only that he was told "we could file *an amendment* later." In the absence of evidence that defendant mistakenly conflated these two terms, his entire argument on this count collapses. Further, an erroneous belief that he was entitled to file

a late return, if supported by the cited testimony, would not be a mistake of fact, but of law.[11]

More generally, defendant's arguments as to all of the tax counts fail for essentially the same reasons discussed above in connection with fraud: if the jury had accepted the factual premise asserted by defendant, it would have been logically compelled to acquit him under the instructions already given, without regard to any separate consideration of a claimed mistake of fact. Thus if the jury had believed (or had entertained a reasonable doubt) that the inaccuracies on the 1998 individual return were the product of a mistake of fact, it could not have found the requisite elements that he "did not believe the tax return to be true and correct as to every material matter" and that he "made the false or inaccurate statements in a voluntary, intentional violation of a known legal duty." Had jurors believed that defendant was unaware of the contents of the 1999 corporate return, or believed them to be correct (whether in reliance on others or not), they could not have found, as they necessarily did, that he lacked belief in the accuracy of that return and intended it to violate a known legal duty. And had the jury accepted the notion that he believed he had complied with his obligations respecting the 1999 individual return, it could not and would not have found that he voluntarily and intentionally breached a "known legal duty" by failing to file. The jury was thus adequately instructed on the issues presented by the cited evidence, and its verdict necessarily reflects a rejection of the factual contentions on which any mistake-of-fact claim necessarily rested.

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[11] The instructions on the tax charges actually permitted a defense based on a mistake of law insofar as they required the jury to find that defendant acted in "intentional violation of a *known legal duty*." (Italics added.) It follows that if jurors had thought defendant honestly believed he was not obligated to file a return—or more precisely, if they had entertained a reasonable doubt on that point—they would have acquitted defendant.

No prejudicial error appears in the failure to give an instruction on mistake of fact.

IV. *Exclusion of Evidence*

Defendant contends that the trial court erred by barring a number of questions that he contends would have tended to exculpate him on the charge of fraud (count 1) by showing that he lacked the requisite intent. He contends that the court erred by finding the evidence irrelevant.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) We need not decide whether the evidence might have possessed some relevance, because its probative value was so slight that its exclusion was harmless by any standard.

Defendant first contends that the court erred by excluding evidence of existence of a bus, presumably owned by PacketSwitch, bearing both the PacketSwitch and Global Crossing logos. Defendant argues that the existence of the bus "tends in reason to corroborate [his] testimony that a strategic alliance, as he understood the terms, was in place as of August 2000." He concedes that the bus was not shown to have been in existence at the time of the alleged fraud, but only came into existence "sometime in the fall or winter of 2000." He then attacks the trial court's exclusion of the evidence on the ground that it rested on the erroneous supposition that post-crime conduct was categorically irrelevant. This is a red herring. The evidence showed only that someone had painted a Global Crossing logo on a PacketSwitch bus. No matter when this happened, it had but a miniscule tendency, if that, to corroborate defendant's claimed belief that the two companies had formed a "strategic alliance." Defendant suggests that the existence of the bus was made more probative by defendant's testimony to the SEC, which was before the jury here, to the effect that there was a "verbal commitment" under which Global Crossing "would provide dark fiber to PacketSwitch at a good price"; that the chairman of Global Crossing had "evinced an interest in sitting on the PacketSwitch board of directors"; and that "many Global Crossing people had visited PacketSwitch

over the previous year, including engineers who demonstrated Global Crossing's technology, and most of their high level executives." On the basis of this evidence, defendant contends that "[t]he existence of the bus . . . tends in reason to corroborate [defendant's] testimony that a strategic alliance, as he understood the terms, was in place . . . ."

We discern no realistic possibility that a reasonable juror would place any credence in defendant's claimed belief that a "strategic alliance" had arisen from the "verbal agreement" of a potential vendor to sell its product at a "good price," from an expression of interest by a principal of that entity in membership on the PacketSwitch board, from a series of visits presumably intended to cultivate a potential customer, or from any combination of these. We have no doubt, and presume the jury had none, that Global Crossing would have been happy to enter into a business arrangement with PacketSwitch under suitably advantageous terms. Defendant's attempt to translate this natural willingness into a "strategic alliance," under some private understanding of that term, was not likely to persuade the jury that he lacked mens rea. More to the point, that argument scarcely gained credibility from the fact that the Global Crossing logo appeared on a bus owned by PacketSwitch. Without evidence of who put it there, for what purpose, and under what circumstances, the presence of the logo meant virtually nothing. Assuming it was not utterly devoid of relevance, its exclusion was harmless error.

Nor do we see any prejudicial error in the court's limitations on the testimony of defense witness Van Der Pfordten. He testified that he had worked at PacketSwitch as an electrical engineer and patent agent for some 15 months and had invested $90,000 in the company. He worked on technology intended to send multimedia content from the United States to Korea via a fiber connection. A terminal for this service was under construction in San Jose when PacketSwitch went bankrupt. In the portion of the proceedings cited as error, defense counsel asked the witness whether completion of "the Korean and American installations" would have enabled PacketSwitch "to accomplish

the goals they set for the Korean endeavor." Upon the prosecution's relevance objection, the court observed that defendant was charged with "making misleading statements[] about what could be done now." The prosecutor concurred, saying, "we are not charging promises because a promise . . . . It's hard to show that's false. We are relying on things he stated as fact[,] existing technology that didn't exist." The court sustained the objection, commenting that the fraud charges depended on "whether he misstated the technology that they had at that time and what it could do . . . ."

Defendant's contention that this ruling was erroneous seems to rest on the idea that the jurors could entertain a reasonable doubt about his possession of the requisite mens rea if they thought that, despite his knowledge that the technology he described did not exist when he said it did, he honestly believed it could and would be developed in the future. He notes that the jury had to find that he acted "with an intent to do something that the law forbids . . . with bad purpose either to disobey or disregard the law," "voluntarily and deliberately rather than mistakenly and inadvertently," and with "intent to defraud." We fail to see how any of these mental states would tend to be negated by evidence that, though he knew his statements were false, he believed they might one day come true. Contrary to the suggestion by counsel below, and the implicit linchpin of defendant's argument here, there is a world of difference between having in fact discovered oil, and expecting to do so.[12] This distinction was not likely to be lost on the jurors, even if defendant had been permitted to attempt to blur it.

Similar reasoning applies to the court's limitation of defense counsel's cross-examination of John D'Arcy, who had contracted with PacketSwitch to work on a multi-tasking network that could transmit thousands of movies at one time. The court sustained

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[12] "MR. FINKELSTEIN: If I could give it an analogy. If he told investors he found oil and it weren't true, he couldn't defend by saying we hope[d] to find gold and—

"MR. HANSON: Why not?"

relevance objections to the questions whether D'Arcy believed the capability sought by PacketSwitch was something he could have accomplished, and whether he still considered the technology he had been working on to be an "opportunity." We further note that defense counsel was permitted considerable latitude in questioning D'Arcy about the capabilities of the technology he was working on.

In attempting to explain the relevance of such testimony, defendant suggests that it tended to show that "defendant had no intent to defraud investors" because he "intended to give great value in return for investors' money," and that even if his statements to them about existing technology were incorrect, his misstatements were inadvertent rather than fraudulent. We fail to see how an intent to "give great value in return for investors' money" has any tendency in reason to negate the mens rea required for securities fraud. Certainly it does not disprove intent to defraud. If the speaker knows his statement is false when made, he intends by making it to deceive the hearer, whether or not he honestly believes the statement will at some point become true. If the rule were otherwise, one who sold securities on false pretenses could insulate himself from punishment for fraud merely by claiming a combination of recklessness and naïveté.

Even if the law permitted the jury to infer a lack of mens rea from a belief by defendant that his statements would come true in the future, the exclusion of such evidence cannot possibly be held prejudicial because the odds of the jury indulging such an exculpatory view were miniscule. We doubt that any reasonable juror would think defendant acted with innocent intent when he claimed to have in hand revolutionary technology he in fact only hoped would be developed. Everyday common experience tells us that a vast difference exists between a functioning new product and one in development. The difference is so well recognized in digital industries that devices and technologies not yet in existence, but touted as though they were, have earned their own sardonic label: "vaporware." Defendant basically contends he was entitled to give the jury the sales pitch he should have given to investors, i.e., that even though the hardware

and software he described was vaporware, it could be developed into a profitable product in the future. We do not find it reasonably likely that this pitch would have dissuaded the jury from finding defendant guilty of fraud, even if the law provided a logical way for it to do so.

Defendant also challenges the court's order striking testimony by Van Der Pfordten that at the time of trial, he did not believe "there was any criminal intent" in defendant's conduct, and directing him not to give his opinion on that subject. Defendant suggests that the prosecutor "should not have been heard to complain" about this testimony because it constituted "a fair and responsive answer to the prosecutor's question." Perhaps that is so, as a matter of etiquette, if the examination of the witness is viewed as conversation. That, of course, is not the governing standard. The prosecutor asked nothing calling for a legal opinion, and the witness was not competent to give one. The questions preceding the challenged testimony were manifestly intended to test the witness's bias, and thus the credibility of his account of defendant's efforts. Thus the prosecutor asked whether the witness "still maintain[ed] that Mr. Ristau was still a good manager of the company" and whether it was "possible . . . that recognizing the true facts concerning Mr. Ristau is just too painful for you given your prior belief in this company and Mr. Ristau?" Defendant supposes the phrase "true facts" to be an allusion to defendant's commission of fraud, but even if we accept this supposition it does not follow that the witness was invited or entitled to offer a legal opinion in response. Defendant cites no pertinent authority, and we know of no doctrine that would bind the prosecutor to accept an answer that strayed into the realm of legal opinion. Further, we find it highly unlikely that this ruling had any effect on the outcome, by itself or in conjunction with other claimed errors.

Also without citing authority or recognized doctrine, defendant contends that error occurred in permitting the prosecutor to allude to various self-serving financial transactions between defendant and PacketSwitch, but then refusing to permit defendant

to ask a questions in a similar vein. Defendant argues, "It is difficult to see why when the prosecution asked a witness whether the amount of [defendant's] compensation was fitting, the question was proper, but when the defense sought to introduce rebuttal evidence by asking essentially the same questions, it was objectionable. The effect of the court's ruling was to allow the inference raised by the prosecutor's evidence to go unrebutted by defense evidence."

Underlying this argument is the supposition that *none* of the cited testimony should have been admitted, i.e., that the testimony sought to be adduced by the defense was admissible only because its exclusion was inconsistent with allowing the earlier testimony. But no objection was lodged to the earlier testimony. If it was improper, the remedy was to object to it, not sit in silence and then claim a later right to introduce objectionable matter to counteract the supposed prejudice of the earlier, unobjected-to questions. Nor do we see how the earlier testimony inflicted any ponderable harm on defendant's case. It tended to show that defendant wasted PacketSwitch assets, but that does not mean defendant is correct in describing its "clear import" as being "to invite the jury to conclude that [defendant] intended to defraud investors by converting the money they had invested to his own use without regard to advancing their investment interests." Since no objection was lodged, the prosecutor had no occasion to explain the intended relevance of the questions. In any event, in the absence of a timely and proper objection the question is academic. No error appears.

V. *Aggravating Factors Not Found By Jury*

By supplemental brief, defendant contends that the sentence must be reversed for *Blakely* error (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*)). In *Blakely* the court held it a denial of due process under the federal constitution to impose a sentence greater than the " 'prescribed statutory maximum' " based on any fact, other than a prior conviction, which has not been " 'submitted to a jury, and proved beyond a reasonable doubt.' " (*Id*., 542 U.S. at p. ___ [124 S.Ct. at p. 2536.]) Defendant contends

that this rule was violated here because the trial court imposed the upper term on the basis of aggravating factors not found by the jury.

At the threshold we reject the People's contention that defendant has failed to preserve an objection under *Blakely* because he raised no similar objection in the trial court. We have rejected this contention in materially identical circumstances. (*People v. Jaffe* (Oct. 13, 2004, H026265) ___ Cal.App.4th ___ [2004 WL 2294460].) We see no reason to depart from that holding here. We therefore turn to the merits.

The *Blakely* decision marks an extension of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). The basic rule of these cases is that, with exceptions discussed below, the state cannot constitutionally subject a defendant to punishment exceeding that to which he is exposed by virtue of the *facts found by a jury*. This does not mean the court can only consider facts found by the jury; it means that those facts fix the maximum sentence the court can impose. Thus if the jury found facts supporting a 10-year sentence, the court is free under *Apprendi-Blakely* to exercise its traditional sentencing power in deciding whether to impose that or a lesser sentence. In exercising that power it might rely on the facts found by the jury *or on other facts*. The *Apprendi-Blakely* rule prevents only the imposition of a punishment greater than could have been imposed based on the facts reflected in the verdict.

There are two exceptions to this rule. The first is that "the fact of a prior conviction" may be found by the trial court without a jury, and may furnish the basis for increasing the defendant's punishment beyond what could be imposed based on the jury's verdict alone. (*Apprendi*, *supra*, 530 U.S. at pp. 466-467.) This exception need not concern us because defendant had no criminal record.

The second exception is that in determining the maximum punishment to which the defendant is subject, the court may consider facts "*admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2537].) The question thus becomes

whether there are any facts found by the jury, or admitted by defendant, which would justify imposition of the upper term.

The court below recited a lengthy litany of facts which it concluded justified imposition of the upper term.[13] Many of these facts seem to be inherent characteristics of

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[13] "THE COURT: . . . Mr. Ristau, one of the things that was mentioned by you and others during the trial is that you were a visionary, you claimed to be a visionary, and perhaps you are. However, a visionary who is a president and a CEO of a company has to follow the same rules as everyone else. A visionary who's trying to sell stock in the company has to have the stock qualified with the California Department of Corrections [*sic*] or only sell to credited [*sic*] investors.

"PacketSwitch stock was not qualified; it was not registered with the FCC [*sic*]. You sold the stock to anyone.

"You deliberately did not define an accredited investor in your waiver form or in your presentations so potential investors would know if they were qualified to buy stock or not, and you never asked whether they met the requirements[.] [A] visionary who is trying to sell the stock in the company has to tell the truth in the company and distinguish between what exists and what is still a vision. You did not do that.

"Instead, you talked about strategic alliances with companies and hiring different officials in government that did not exist. You claimed to be receiving movies over a completely wireless system[;] it was not.

"[¶] . . . [¶]

"A visionary CEO has to maintain accurate records about expenses and payrolls. You had your paychecks made out to your wife and treated your employees as independent contractors[,] evading responsibility for payroll taxes and benefits.

"A visionary has to file adequate tax returns. You signed returns that you knew were not accurate or did not file at all.

"In reviewing the probation report in the case, I looked for ways to find that your conduct was mitigated or even that it only deserved a midterm sentence[.] I was unable to find justification for such a sentence.

"Your continual claims of innocence . . . throughout . . . the trial here show that you have a total lack of remorse; you have a total lack of any acceptance of the responsibility for conduct and it[s] consequences.

"You have never acknowledged that you mismanaged the investment funds and you have an excuse for everything.

the offenses, e.g., that defendant sold unqualified stock to persons who were not confirmed to be, and in fact were not, accredited. Others involved facts that were by no means necessarily found by the jury—e.g., that defendant's testimony before the SEC (transcribed as "FCC")[14] was "not clearly meant to enlighten, but to confuse." With one arguable exception, none of the stated facts were couched in terms of the enumerated statutory criteria supporting imposition of the upper term. (See Cal. Rules of Court, rule 4.421.)

The one exception was the court's statement that defendant exhibited a "total lack of remorse." While this is not among the enumerated criteria in aggravation, it is among the enumerated criteria bearing on a defendant's suitability for probation. (Cal. Rules of

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"You continue to blame the FCC [*sic*] for the failure of PacketSwitch even though its investigation was in response to complaints.

"What should they have done?

"You had your salary paid to your wife because you said that you had had problems with banks; a nonsense explanation.

"You did not try to find out whether people were really accredited investors. You said[,] [w]ell, they lived in Silicon Valley, so they were sophisticated investors[,] or because it was so expensive to live here you assumed they had the [re]quired net worth [or] salaries.

"Your answers to questions to the FCC [*sic*] in front of the grand jury in the trial were often not clearly meant to enlighten, but to confuse[.] [Q]uestions had to be asked repeatedly before you . . . give a direct answer.

"The FCC [*sic*] attorneys found out that your answers were obfuscated, and the jury obviously did not believe in you.

"Some people do believe in you, but it appears that most of the nine hundred investors in PacketSwtich realize they were defrauded. But you and perhaps some of them realized to see the vision in the future, and hopefully it will be done without squandering the funds that they invested.

"As to Count 1, a violation of Corporations Section [*sic*] 25541, I am imposing the aggravated term of five years for the reasons that I have just stated. . . ."

[14] "SEC" is mistranscribed throughout the reporter's transcript as "FCC," even on pages where the Commission is also referred to by its full name.

Court, rule 4.414(b)(7); cf. Cal. Rules of Court, rule 4.421.) In a proper case it may be deemed a factor in aggravation. (*People v. Key* (1984) 153 Cal.App.3d 888, 900-901.) However, it may not be a proper factor where the defendant denies committing the crimes and the evidence of guilt is less than overwhelming. (*Id.* at p. 901.) Here defendant denied committing the crimes, and strong as the evidence was, we hesitate to characterize it as "overwhelming."

More to the immediate point, it is far from apparent that defendant "admitted" a lack of remorse, or any other aggravating factor, for purposes of the *Apprendi-Blakely* rule. It is true that defendant's own comments at the sentencing hearing tended to show a certain refusal to accept blame for the matters alleged against him. However this was not a direct admission that he felt no remorse. Indeed while the remarks *supported* a *finding* to that effect, a reasonable factfinder might also find defendant's account of his conduct so equivocal, not to say irrational or even bizarre, as to render concepts like "remorse," or its opposite, inapplicable.[15] Therefore, even if the record would have supported a finding

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[15] "THE COURT: . . . Mr. Ristau, do you wish to make a statement?

"Mr. Ristau?

"Mr. Ristau?

"MR. RISTAU: Yes, I would.

"[¶] . . . [¶]

"MR. RISTAU: My name is Steve Ristau, and the purpose of PacketSwitch and everyone who came into the facility knew what the reason for PacketSwitch was to pray, build a kingdom of God and invest in the kingdom, and I still believe that today.

"Mr. Finkelstein [the prosecuting attorney] has repeatedly misrepresented the facts to the jury and as well as to this court and has denied every opportunity for this defense to defend itself in this courtroom.

"We had technology. We had patents that were approved by the United States patent office; we had strategic alliances; we had a real plan. Although, he will deny our plan and disagree with our plan, we had a technological plan which is the circuit switch network is dead and the light based photonic network is our future and all of the technology is based upon that future. We had a financial plan.

of lack of remorse as a circumstance in aggravation, it cannot be said that this circumstances was either found by the jury or admitted by defendant for purposes of *Apprendi-Blakely*.

The People contend that if we find *Apprendi-Blakely* error, we should find it harmless beyond a reasonable doubt because the jury *would have* found at least one aggravating factor if asked to do so. We decline to engage in such speculation.

DISPOSITION

The judgment is remanded for further proceedings in accordance with this opinion and *Blakely*. In all other respects, the judgment is affirmed.

"The number one application for our technology was finance; to put the banking on a backbone for a new network, the next generation network itself. And ultimately we had the spiritual application of our company. It was through our technology and through the financial plan that we were to present the spiritual plan.

"And the spiritual plan itself is what I feel is the most important one of all, because we are living in an age with the angel of death is living and the seals of God must be shifted or the planet will be white. And I am not joking.

"There are two groups of people on this planet; the humble and the proud, and the reason God put us here is to train us and separate the humble from the proud.

"And this is the time when my father will send his angels throughout this entire planet to separate the humble from the proud. The proud will rise to the top like in a chemistry experiment; the humble will rise to the bottom. And he is coming to separate the humble from the proud.

"[¶] . . . [¶]

"And now it's graduation day and my father in heaven is commanding me to tell you this that we must be willing to die for our enemies and willing to go to hell for our enemies and to bless those who hate us and bless those who persecute us. And if we don't do this, there's no hope for this planet.

"So I am here to bless you and to bless those that feel I have hurt and wronged them."

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Trial Court:	Santa Clara Superior Court Superior Court No.: 210662
Trial Judge:	The Honorable Joyce Allegro
Attorneys for Defendant and Appellant Steven Allan Ristau:	Thomas M. Singman Jill M. Bojarski under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Bill Lockyer, Attorney General Robert R. Anderson, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Eric D. Share, Supervising Deputy Attorney General Dorian Jung Deputy Attorney General